No. 2956

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

POWER AND IRRIGATION COMPANY OF CLEAR LAKE (a corporation),

Plaintiff in Error,

vs.

HEINZ SPRINGE,

Defendant in Error.

REPLY TO SYLLABUS OF POINTS OF LAW MADE IN THE ORAL ARGUMENT OF CHARLES S. WHEELER.

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Pernau-Walsh Printing Co.

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DEFENDANT IN ERROR ENTITLED TO RETAIN MONEYS PAID TO HIM UNDER THE CONTRACT.

1. Plaintiff in error in this case seeks to recover from defendant in error certain moneys paid by his assignor, J. Dalzel Brown, on the purchase price of certain lands under a contract for the sale and purchase of real estate. *Brown admittedly failed to pay the final installment of the purchase price under the contract.* The contract provides:

> "But if the sale herein provided for is not consummated under the terms and conditions of the agreement by reason of the failure of the purchaser to pay the balance of the

> purchase price when due as herein provided, then the sums of money paid by the seller on account of the purchase price and interest thereon shall be forfeited and retained by the seller as liquidated damages, and the seller shall be thereafter released from all further obligation in law and equity to convey said lands, and may at once take possession thereof and re-rent the same." (Tr. pp. 12-13.)

Therefore, not only under the law but *by the express terms of the contract* the vendor, Springe, *the defendant in error* in this case, *was entitled to retain the purchase money paid by Brown on the contract.*

In *Skookum Oil Company v. Thomas,* the Court says:

> "It seems to us that the principles so clearly presented in Glock v. Howard & Wilson Colony Co., 123 Cal. 1, (69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713), are determinative of the questions here involved. It is was there held that under a contract for the sale of real estate, in which time is made of the essence of the contract and performance by the vendee is made a condition precedent to a conveyance and upon breach thereof he is declared to forfeit all rights thereunder, *including payments made thereon,* the vendee cannot, after his default, without excuse shown therefor, by a tender of the amount due, acquire either an equitable or a legal right to maintain an action to recover back the moneys paid under the contract, nor can the purchaser, in such case, put the vendor in default by mere tender; nor can he elect to consider the contract at an end, and recover what he has paid on the contract, when the vendor has not abandoned the contract, but stands upon its terms and conditions. It was

> also held that under such a contract, the refusal of the vendor to accept a tender made by a purchaser after such default, does not effect a rescission of the contract, nor entitle the vendee to recover the money paid. Neither will equity relieve such purchaser who has made an unexcused default and has not fulfilled conditions precedent to the vesting of his right of action. It was held further that the vendor's right to retain the purchase money, where default was unexcused, is independent of any express clauses in the contract for forfeiture of rights, or for the retention of the purchase money as liquidated damages, and that such express clauses are but declarations in express terms of the legal rights of the parties under such a contract, existing without them."
>
> *Skookum Oil Co. v. Thomas,* 162 Cal. 544, approving *Glock v. Howard,* 123 Cal. 1.

2. Plaintiff in error attempts to avoid *the force of law and the terms of the contract* as above expressed by setting up the ingenious *if not convincing* contention as follows: (a) The vendee was in default because he failed to make the final payment under the contract upon tender of deed; (b) the vendor was in default because he was unable to convey a good title; (c) both vender and vendee being in default, either could elect to treat the contract as rescinded and recover from the other whatever he had given to the other in part performance. (Plaintiff in Error's Syllabus of Points etc. pp. 1, 2 and 3.)

3. Unfortunately for plaintiff in error's contention, his whole argument is based upon two *supposed*

facts—*neither of which exist.* These *supposed* facts are:

(A) Default of Springe; the vendor under the contract;

(B) An *implied* mutual rescission of the contract.

(A) SPRINGE NOT IN DEFAULT.

4. The question as to whether or not Springe, the vendor under the contract, could or could not furnish the vendee a good title cannot be considered in this case for two reasons, viz:

(1) The vendee *elected* to demand a deed and take such title as the vendor had, or was able to give, and to hold him liable in *damages* for any loss suffered by reason of a defective title; and—

(2) The vendee is *estopped* by his acts—and by the judgment in the action in ejectment—from claiming the vendor did not have or was not able to furnish a good title.

Brown's assignor, Shuman, notified Springe:

> "* * * I elect to insist upon the specific performance of Mr. Springe's agreement to sell." (Tr. p. 126.)
>
> "* * * I hereby give notice that I will hold Mr. Heinz Springe liable for all *damages* suffered or occasioned by reason of his refusal to remove the said specified defects." (Tr. p. 127.)

(3) Springe did tender a good title. (Tr. pp. 94-95.)

Brown having entered into possession of the real property under the contract refused to surrender possession, though requested so to do, after tender of a deed by Springe and demand by Springe for the payment of the balance of the purchase price. (Tr. p. 95.) Springe thereafter brought an action in ejectment for the possession of the real property. (Tr. pp. 146, 160.) In that action Brown in his answer set up his right of possession under the contract, litigated the case on that theory, and judgment was rendered against him—not on the theory of an *implied mutual* rescission of the contract—but on the theory that Springe *was not* in default under the contract; that Brown *was* in default under the contract; and that Brown (and his assignee) *had forfeited all their rights under the contract.* (Tr. pp. 91-100-150.)

Had Brown on tender of the deed to him by Springe, paid the balance of the purchase price he *then* could have brought suit against Springe for any damage he might have suffered by reason of any defects in Springe's title.

In *Gates v. McLean,* the Court says:

> "* * * In the latter case it is considered that he is willing to receive such title as the vendor is able to give and he is content with the personal responsibility of the vendor upon his conveyance."
>
> *Gates v. McLean,* 70 Cal. 42, approved in *Worley v. Nethercot,* 191 Cal. 517.

But Brown failed to make payment or to tender payment on tender of the deed to him by Springe, so the question of defects in Springe's title from that time on was and is *wholly out of the case.*

In *Gervaise v. Brookins,* the Court said:

> "These doctrines dispose of the case. Brookins is estopped from denying the title of Book while he retains the possession which he obtained from Book in pursuance of the contract of sale. Hence, he cannot set up the want of title as an excuse for non-performance on his part. The proffered defense to the action for possession, founded on the failure and inability of the vendor's successor in interest to comply with Brookin's demand for a good title, must be disregarded, because of the fact that he received his possession from Book, from whose successor he would now withhold it. *His retention of the possession thus received binds him to pay the price and accept the vendor's title, such as it is.*" (The italics are ours.)
>
> *Gervaise v. Brookins,* 156 Cal. 108.

In *Rhorer v. Bila,* 83 Cal. 54, (23 Pac. 275), upon similar facts the Court says:

> "A purchaser cannot remain in possession of lands under a contract and at the same time refuse to pay the purchase price. * * * So long as the purchaser retains possession he waives all previous objections, whether of defect of title or delay in completing it; and is bound to accept title according to the terms of the contract if offered while he still retains possession." In *Gates v. McLean,* 70 Cal. 50, (11 Pac. 492, 493), the court says: 'Even where the contract provides for the vendee taking possession, the remedy of the purchaser, where the title of the vendor fails, or

he is unable to make conveyance as stipulated in the contract, is to rescind the contract, or offer to, and to restore the possession, in which case he may recover the purchase money advanced and the interest, together with the value of his improvements, deducting therefrom such sum as the use of the premises may reasonably have been worth. If, on the other hand, the purchaser chooses not to rescind, but to retain possession under the contract, he can do so only on the condition that he pays the purchase money and interest according to the contract. *In the latter case, it is considered that he is willing to receive such title as the vendor is able to give.'* This doctrine is also approved in *Garvey v. Lashells,* 151 Cal. 531, (91 Pac. 498); *Keller v. Lewis,* 53 Cal. 118; *Haynes v. White,* 55 Cal. 41; *Central P. Co. v. Mudd,* 59 Cal. 590; *Whittier v. Stege,* 61 Cal. 241; *Hannan v. McNickle,* 82 Cal. 126, (23 Pac. 271); *Worley v. Nethercott,* 91 Cal. 517, (25 Am. St. Rep. 209, 27 Pac. 767); *Hill v. Den,* 121 Cal. 46, (53 Pac. 642); *Haile v. Smith,* 128 Cal. 419), (60 Pac. 1032.)"

Approved in *Gervaise v. Brookins,* 156 Cal. 107-108.

Neither does the contention by plaintiff in error that the provision that "time was of the essence of the contract" was waived by the vendor in any sense aid him for, if true, the only effect of such waiver was to require a tender of the deed as a prerequisite to putting the vendee in default—and such tender of deed was admittedly made.

In *Hayt v. Bentel,* the Court says:

"* * * reliance is placed upon *Glock v. Howard etc. Co.,* 123 Cal. 1, (69 Am. St. Rep.

17, 43 L. R. A. 199, 55 Pac. 713). In the opinion in that case, the status of a defaulting purchaser under a contract for the sale of real estate is fully discussed, and the rule declared that such a purchaser, who has, without excuse, failed to make payment of installments as they fell due, *cannot, by a belated tender, put the seller in default and thus establish a right to recover the sums paid under the contract.* But this undoubtedly sound doctrine does not apply to a case where the vendor has waived the delay in making payments. * * * These facts bring the case precisely within the principle declared in *Boone v. Templeman,* 158 Cal. 290, (139 Am. St. Rep. 126, 110 Pac. 947). There the court declared the rule to be that where the vendor, under an agreement like the one before us, permits the entire contract price to become due, without exercising his option to declare a forfeiture, 'the payment of the price then become a dependent and concurrent condition, non-payment alone does not put the vendee in default, *the vendor must tender a deed as a condition to demanding payment of the price, and he cannot, without such tender, declare a forfeiture,* or maintain a suit either for the whole price, or for an intermediate installment.' ''

Hayt v. Bentel, 164 Cal. 684.

Brown, the vendee, having made default in the payment of the final installment of the purchase price upon tender of the deed by Springe, Springe had the right under the law—and also by express terms in the contract—to *retain the installment payments paid by Brown* and to bring suit to eject

Brown from the real property as Brown had failed to surrender it on demand made.

Glock v. Howard, 123 Cal. 1;

Skookum Oil Company v. Thomas, 162 Cal. 544.

(B) NO RESCISSION OF THE CONTRACT—ACTUAL OR IMPLIED.

5. The sole remaining contention of plaintiff in error is that because Brown, within a few days after judgment rendered against him in the ejectment suit, surrendered the possession of the real property to the defendant in error, pursuant to the judgment, then, forsooth, the contract must be deemed rescinded by mutual consent of the vendor and vendee—and that, therefore, the vendee can recover the moneys paid by him on the contract.

Such a claim, we submit, merits no consideration.

In *Odd Fellows' Savings Bank v. Brander,* 124 Cal. 258, the Courts say:

> "It is well settled that 'a party who has advanced money, or done an act, in part performance of the agreement, and then stops short and refuses to proceed to its ultimate conclusion, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, will not be permitted to recover back what has thus been advanced or done.' (*Hansbrough v. Peck,* 5 Wall. 497; *Ketchum v. Everston,* 13 Johns. 359; 7 Am. Dec. 384; *Keller v. Lewis,* supra.) This is true whether or not the contract provides for a forfeiture of payments made in case of the

vendee's failure to complete the purchase. (*Glock v. Howard etc. Co.,* 123 Cal. 1.) The present case is a striking illustration of the wisdom and justice lying at the root of this rule. Brander and his assigns have been in possession of this land since the purchase, presumably receiving its rents and profits, and have not only failed to make the payments due on the principal debt, but have defaulted in payment of rent and taxes to an amount greater than the payments made on the price. The contention of defendants has no merit. The law will not permit defendants to profit pecuniarily by their own default."

Odd Fellows' Savings Bank v. Brander, 124 Cal. 258.

See, also,

Orsler v. Thacher, 152 Cal. 739.

A party in default cannot rescind—without the consent of the other party; and Brown, assignor of plaintiff in error, was in default—and was so adjudged in the action in ejectment—prior to the surrender by him of the possession of the real property pursuant to the judgment. There is not one particle of evidence—nor is there any presumption—that Springe, the vendor, consented to a rescission of the contract. Such consent exists alone in the brain of counsel for plaintiff in error.

The urging of such contention, as was well said in *Bingham v. Kearney,* 136 Cal. p. 177, we submit, is merely trifling with the Court.

Further, as it is stated in our Civil Code:

> "he must rescind promptly upon discovering the facts which entitle him to rescind." (The italics are ours.)
>
> *California Civil Code,* Section 1691.

See

> *Cross v. Mayo,* 167 Cal. 604-605.

When Brown went to trial in the action in ejectment, wherein he set up his rights under the contract, he then, if not before, abandoned and lost forever any right he at any time may have had to rescind the contract.

As was said in *Cross v. Mayo:*

> "While the point is not available on the appeal from the order denying a new trial, there is no force in defendant's claim that he is, in any event, entitled to a return of the payments already made by him under the contract. The authorities relied on by him state the rule in cases where there is a rescission, or abandonment by consent. There was no rescission or abandonment by consent in this case, defendant's claim for a rescission being denied by the judgment. Plaintiff has not attempted to rescind, but has always insisted on the contract and is standing on its terms. His right to retain the purchase price already paid, including the property deeded to him in part payment thereof, is fully sustained by many decisions in this state. (See Glock v. Howard etc. Co., 123 Cal. 1, (69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713); Odd Fellows' Savings Bank v. Brander, 124 Cal. 255, (56 Pac. 1109); Oursler v. Thacher, 152 Cal. 739, (93 Pac. 1007).)"
>
> *Cross v. Mayo,* 167 Cal. 606.

ESTOPPEL BY JUDGMENT.

6. J. Dalzel Brown, the assignor of plaintiff in error, had his day in Court.

In the action in ejectment Brown, the assignor of plaintiff in error, had the undoubted right to set up—and he did set up—all his legal and equitable defenses to Springe's action in ejectment.

In *Doherty v. Courtney* (which was an action in ejectment) the Court, by Sloss, J., says:

> "Under our system of procedure, where legal and equitable remedies are administered in the same tribunal and there are no special forms of action, a defendant may set up by way of equitable defense, any matter which would, if presented by him as the basis of an original bill in equity, have entitled him to a judgment for the relief sought by his answer. The rule has repeatedly been applied in actions of the character of the present one. In *Willis v. Wozencraft,* 22 Cal. 607, this Court said: 'A mere equitable title to land, if it is of such a character as entitles the holder to possession in equity, is a sufficient defense under our system of practice to an action for the possession, brought even by the holder of the legal title.' "
>
> *Doherty v. Courtney,* 150 Cal. 608.

While Springe, in the action in ejectment, did not in terms ask that the contract be declared in force or that the payments made thereunder be forfeited, both questions were necessarily raised and involved in the action when Brown, by his answer therein, set up the contract and alleged his right to the possession and of purchase of the real property there-

under; and the Court's judgment foreclosed Brown's rights under the contract.

In *Bingham v. Kearney* the Court says:

> "The former action was between the same parties. It involved the same subject matter—the contract concerning the sale of the land. The court in the former action had declared the contract valid, and that the defendant had the right to have it forelosed and to be restored to the possession of the land. The present action is brought for the purpose of having the same contract rescinded and to recover the payments made thereunder. The Court which in the former action declared the contract valid and the payments made thereunder forfeited, is asked in this action to declare the contract void, and that plaintiff may recover the payments made thereunder. It is the rule, long recognized in this country, that a judgment between the same parties is conclusive, not only as to subject matters in controversity in the action upon which it is based, but also in all other actions involving the same question, and upon all matters involved in the issues which might have been litigated and decided in the case, the presumption being that all such issues were met and decided. It is not the policy of the law to allow a new and different suit between the same parties, concerning the same subject matter, that has already been litigated; neither will the law allow the parties to trifle with the courts by piecemeal litigation. When plaintiff was brought into court by defendant in the former case, she certainly knew her rights. If she wished to rescind the contract, or if she had rescinded it, as she said in her answer she had done, then and there was the time to present her pleadings and evidence and insist upon all rights to which she was entitled under the law. If she could not

> get the award of the law upon the facts in the lower court, she could have appealed. She did not do so. She is now met by the presumption that all the facts and matters in controversy were disposed of in the former suit, and the further presumption that the judgment in the former suit is correct. If she failed to assert her claim properly, or to present the proper evidence in the first suit, she will not now be permitted in a second to litigate it. The principles herein stated are elementary. They are stated in the late case of Quick v. Rooney, 130 Cal. 510."
>
> *Bingham v. Kearney,* 136 Cal. p. 177.

Brown, appeared in the action in ejectment, set up a number of defenses, and was defeated. Among the defenses thus set up was one that involved a specific performance of the contract. (Tr. pp. 80-5.) Another defense was that he had made an assignment over to a third person who was in possession of the premises under him and in this regard the vendee further alleged that that person had brought suit against him and the vendor claiming specific performance of the contract and tendering the money. (Id.) These allegations, of course, were all found against him (see p. 91 et seq.) when judgment was rendered for the vendor; but, in addition, they constituted complete, absolute and specific waivers of any alleged defects in the title and they were the antithesis of the alleged rescission relied upon in this case.

We need not repeat what was said on the oral argument on this point, nor recopy the allegations

referred to, but we may refer to pages 30 to 40 of our brief and to pages 60 to 99 of the record where, we think, the Court will be astonished at the record facts on this point.

On March 18, 1907, the vendee formally notified the vendor in writing that he elected to insist upon the specific performance by the vendor of his agreement to sell. This election is found on pages 126 to 127 of the transcript and is referred to by us on page 6 of our brief. Such an election forever terminated the right of the vendee to do anything except to pay the money and to require the vendor to execute and deliver a deed. It was a waiver of all defects in the title, and, without regard even to the judgment, ought to dispose finally of the plaintiff in error's case.

In California the judgment roll consists of the pleadings, the findings, and the judgment (C. C. P. § 670) and the judgment, of course, must be read in the light of the findings and the pleadings. *(Illinois P. & J. Bk. v. Pac. Ry. Co.,* 115 Cal. 297.) The findings in the action of ejectment are in the record and they find practically everything against the vendee. (Tr. p. 91.) They not alone find everything in favor of the vendor which was essential to the case, and without which judgment could not have been rendered in his favor, so as to enable him to maintain ejectment, but, in addition, they find against the vendee specifically on every claim which he had voluntarily set up in his answer in that case. (See pp. 91 et seq.) The judgment entered upon

these findings, of course, is conclusive upon all of these questions and as said by the judge of the Court below, where a party undertakes in a court of justice to set up a defense which we may assume he need not even have set up, but judgment goes against him, he is concluded forever from asserting that defense in another case.

Bingham v. Kearney, 136 Cal. 177.

As pointed out by us at the oral argument, it is a rule of law that a judgment is an estoppel in a subsequent suit upon the same cause of action, not alone upon every matter which was litigated in the former action but upon every matter which might possibly have been litigated in that action. Where the cause of action in the subsequent case is different, however, the rule is subject to the modification that the judgment is an estoppel as to those matters which were actually litigated in that action or such matters as were so necessarily involved therein that the judgment could not have been rendered without deciding them. *(Cromwell v. County of Sac.,* 94 U. S. 351.) In this case we are within both principles because, as we have pointed out, the judgment for the plaintiff in an ejectment suit could not have been rendered without establishing that the vendee was in default; while, on the other hand, the judgment in this case not alone established that fact but, by reason of the specified assertion by the vendee of a number of defenses which he set up in that action, concluded the vendee from asserting in any other Court any of these defenses.

The fact that an appeal was not taken by the vendee from the judgment in the ejectment suit is not material. He was not bound to appeal. Nor is the fact, that after the judgment ousting him from possession was rendered, he surrendered possession of the premises a rescission of the contract. The surrender was not voluntary but was under the process of the Court just as much so as if he had been put out physically by the sheriff. The contract was no longer there to rescind because it had become *merged in the judgment* which was based upon it.

NO OFFER TO RESCIND EVER MADE.

7. A further, although a minor reason why we think this action cannot be maintained was advanced at the oral argument and to which we make a brief reference. The contract of sale between the parties fixed the purchase price at $50,000, and it related to both real and personal property. The contract provided for four installment payments, of which all were paid except the last. Of the first payment it was agreed that $8000 should be regarded as applicable to the purchase price of the personal property. *The complaint seeks to recover the full amount paid, including the amount paid on account of the personal property.* Plaintiff in error does not offer to restore the personal property or to credit its value.

A rescission can not be effected unless the party restores or offers to restore everything of

value which he has received under the contract rescinded. There is no allegation in the complaint and no proof that prior to the commencement of this action the plaintiff ever tendered to the defendant the personal property referred to, or ever offered to credit him with its value. *There* is no proof that the original *status quo* was ever sought to be reinstated. If a rescission of this contract in part,—which in effect is what the plaintiff seeks to bring about in this case,—is permissible, we have this singular result:

(a) The contract is rescinded in part and is executed in part; for that portion of the agreement relating to the personal property is not alone treated as valid but it is regarded as executed and sustained.

(b) Such rescission is a direct violation of the plain language of the Civil Code, Section 1691, subdivision 2, which provides how a rescission shall take place:

> C. C., Sec. 1691. "RESCISSION, how effected. Rescission, when not effected by consent, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules:
>
> 1. He must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind; and,
>
> 2. He must restore to the other party everything of value which he has received from

> him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so."

(c) It is very plain that this separation of the contract for the purposes of rescission can not take place without making a new contract for the parties. Thus *non constat* the original contract for the realty might never have been entered into had not the clause with respect to the personalty been agreed to. If, therefore, one of the parties desires to rescind the contract with respect to the realty, he should also rescind it with respect to the personal property.

(d) The closing paragraph of this agreement shows that it was intended by the seller to sell, and by the purchaser to buy *all* the *real property and property rights* of every kind owned by the seller and situated in the County of Lake, State of California, with the exception of certain specified property; and it was specially agreed that if there were any other properties belonging to the seller, they should be deemed to have passed to the purchaser under the agreement.

The purchaser, therefore, can not now treat this contract as rescinded without rescinding it *in toto,* and must, as a condition precedent to the maintenance of his action, allege that he has restored,

or has offered to restore, everything that he got under the contract, real or personal property.

Civ. Code, Sec. 1691;

Southern Pacific R. R. Co. v. Choate, 132 Cal. 280;

McCracken v. City of San Francisco, 16 Cal. 638;

Laffey v. Kaufman, 134 Cal. 391.

The above considerations, we think, are fatal to plaintiff in error's case; and it is submitted that the judgment should be affirmed.

Dated, San Francisco,
January 21, 1918.

Respectfully submitted,

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